Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994
No._____

ALBERT ALEXANDER, M.D.
Petitioner

vs

SAM PATTERSON, M.D.
and STATE VOLUNTEER
MUTUAL INSURANCE
COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Submitted by:
ALAN BRYANT CHAMBERS
TIMOTHY R. HOLTON
CHAMBERS, CROW, DURHAM & HOLTON
200 Jefferson Ave. Suite 750
Memphis, TN. 38103
901-525-4297
Attorneys for Petitioner Alexander

QUESTIONS PRESENTED FOR REVIEW

1. Does the statutory construction in this case prevent everyone who suffers medical malpractice from seeking relief in court, thereby departing from the accepted and usual course of judicial proceedings so as to require this Honorable Court to exercise its power of supervision?

2. Did Court of Appeals for the Sixth Circuit and the District Court err weighing and evaluating proof and resolving factual issues presented through a Motion for Summary Judgment?

3. Do the decisions of the Court of Appeals for the Sixth Circuit and the District Court violate the provisions and protections afforded in 42 U.S.C. 1985 (2)?

4. Do the decisions of the Court of Appeals for the Sixth Circuit and the District Court improperly overrule the following decisions:

First National Bank of Arizona v. City Service Co. 391 U.S. 253 (1968)
Anderson v. Liberty Lobby Inc. 477 U.S. 242 (1986).
Celotex v. Catrett, 477 U.S. 317 (1986)
United States v. Murphy 937 F. 2d 1032 (6th Cir. 1991)
United States v. August, 745 F. 2d 400 (6th Cir. 1984)
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OPINION BELOW

The Court of Appeals for the Sixth Circuit entered its judgment affirming the Trial Court's Order dismissing Plaintiffs complaint pursuant to a Motion for Summary Judgment on August 10, 1994. A copy of that opinion is contained in the appendix attached hereto. A copy of the Trial Court's Order Granting Summary Judgment is contained in the appendix attached hereto.

JURISDICTION

On August 10, 1994, the Court of Appeals for the Sixth Circuit rendered an Opinion affirming the District Court's Order granting Summary Judgment and dismissing Plaintiffs complaint. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by Title 28 Section 1254.

STATUTE INVOLVED

42 U.S.C. 1985 (2):

Obstructing justice; intimidating party, witness or juror. If two or more persons in any state or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;...

STATEMENT OF THE CASE

Specifically at issue in this petition is the Trial Court's dismissal of plaintiffs cause of action for damages for violations of 42 U.S.C. 1985 (2), and the Opinion of the Court of Appeals affirming that decision.

Outline of Facts:

Plaintiff Albert Alexander is a medical doctor who has been retained from time to time to testify as an expert witness in medical malpractice cases primarily on behalf of plaintiffs.

Defendant Patterson is likewise a medical doctor who has spoken out repeatedly against physicians who have testified for Plaintiffs in medical malpractice cases. He is also a member of the Claims Review Committee of Defendant State Volunteer Mutual Insurance Company.

The Defendant State Volunteer Mutual Insurance Company (SVMIC) is an insurance company which provides medical malpractice insurance to physicians practicing in Tennessee, including Defendant and others.

Shortly after Dr. Alexander began reviewing medical malpractice cases and testifying in Court, he became the target of actions by Defendant Patterson and others who sought to dissuade him from testifying for plaintiffs in medical malpractice cases. Later, Defendant and others undertook to retaliate against Dr. Alexander for his having testified for plaintiffs in court proceedings, including a number of medical malpractice cases filed and tried in the United States District Courts.

Dr. Alexander has testified that the actions of the Defendants herein and others have damaged his professional reputation and harmed him financially in his medical practice.

Action of the Trial Court:

The United States District Court for the Western District of Tennessee, Honorable Judge Julia Smith Gibbons, granted Defendants' Motions for Summary Judgment, dismissing Plaintiff's case against the defendants.

In her Order granting Summary Judgment, the District Court ruled that Plaintiff had made out the necessary showing of a conspiracy, but had failed to show that Plaintiff was damaged as a result of that conspiracy. In particular, the trial court found that Defendant SVMIC had a significant financial interest in the actions of experts who testified for plaintiffs in medical malpractice cases.

It is submitted the trial court erroneously concluded that Dr. Alexander had not shown the actions of the conspiracy resulted in any injury to him.

The Trial Court concluded that Summary Judgment should be granted to Defendants and SVMIC, and thus dismissed Plaintiff's complaint.

Action of the United States Court of Appeals for the Sixth Circuit:

In its Opinion affirming the decision of the Trial Court, the United States Court of Appeals for the Sixth

Circuit held that Plaintiff had shown that he was damaged, but had failed to prove a conspiracy. The Court of Appeals for the Sixth Circuit found that Dr. Alexander was being denied membership in a health provider organization, losing physician referrals and being shunned by colleagues as a result of the actions by Defendant and others.

Additionally, the Opinion of the Court of Appeals is inconsistent in and of itself wherein it specifically recites that Patterson . . **"and others** confronted Alexander and tried to dissuade him from testifying in future cases." (Opinion at Page two, attached as Exhibit 1 to Appendix). However, in that same Opinion, the Court concludes that Plaintiff failed to show a conspiracy.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

1. The Court of Appeals for the Sixth Circuit, and the United States District Court in ruling against Plaintiff in this matter, so far departed from the accepted and usual course of judicial proceedings as to require this Honorable Court to exercise its power of supervision?

Your Petitioner would respectfully urge that the Opinion of the Court of Appeals for the Sixth Circuit in this case, along with the initial decision of the Trial Court, is an egregious departure from the accepted and usual course of judicial proceedings and process, and thus requires the intervention of this Honorable Court to prevent an absolute miscarriage of justice.

The Opinion which Petitioner now asks be reviewed, is so wholly inconsistent within the opinion itself as to be irreconcilable.

The Opinion recites that:

". . . [H]e, {Defendant Patterson} and others, confronted Alexander and tried to dissuade him from testifying in future cases [.]" and concludes that such actions caused Plaintiff to be damaged. (Opinion at Page 2).

That Opinion goes on to uphold the dismissal of plaintiffs cause of action because the Court of Appeals found no proof of a conspiracy.

It is this dichotomy which mandates a review of this case by this Honorable Court. The Court of Appeals for the Sixth Circuit found that Defendant and, **"others,"** took actions which harmed the Plaintiff. This finding, it is submitted, is by definition a conspiracy. To then hold that Plaintiff had not shown such a conspiracy is clearly error.

2. The trial court and the Court of Appeals for the Sixth Circuit erred in resolving factual disputes which arose through a Motion for Summary Judgment in a fashion violative of the principles announced by this Court in Anderson v. Liberty Lobby, 477 U.S. 242 (1986) and Celotex v. Catrett, 477 U.S. 317 (1986)?

Plaintiff's case was dismissed pursuant to Motions for Summary Judgment filed by Defendants and SVMIC.

It is respectfully urged that the Trial Court, and in

turn the Court of Appeals for the Sixth Circuit, disregarded the principles established by this court in 1986 in Liberty Lobby and Celotex for considering a Motion for Summary Judgment.

In opposing the Defendants' Motions for Summary Judgment, Plaintiff presented proof which established the following:

1. That the Defendant, as President of the Central Association of Obstetricians and Gynecologists, had openly and vociferously expressed the view that "hired guns," [his pejorative for plaintiffs' experts in medical malpractice cases], should be banished from the sphere of credibility.

2. After openly expressing his belief that plaintiffs' experts should be banished, Defendant was placed on the Claims Review Committee of Defendant SVMIC. This occurred after one Dr. Kelley Avery, a member of the Loss Prevention Committee of SVMIC, heard Defendant deliver his "banishment" speech to a group of Memphis OBGYNs,

3. After his placement on the Claims Review Committee, Defendant began making inquiries into testimony given by Plaintiff Alexander in medical malpractice cases outside of Tennessee particularly a case in Elizabethtown, Kentucky which was tried in the United States District Court.

4. After initially learning about Dr. Alexander's testimony, Defendant, a member of the Claims Review

Committee of SVMIC, met with Dr. Alexander and asked him to stop testifying.

Sworn testimony was presented to the Trial Court wherein Defendant discussed the injuries to Dr. Alexander because of the actions by him and others:

Q. How is he viewed by his peers?
A. In obstetrics and gynecology today?
Q. Yes sir.
A. He's viewed as a hired gun today and not admired today because of that.

Q. When did he become viewed as a hired gun by his peers?
A. Right after we talked about it, in 19 — it was after 1986."

Testimony was also presented by Dr. Alexander himself who testified that as a result of the "hired gun" label which he has been saddled with, his patient referrals from physicians, which he used to a large extent to build his medical practice, had fallen off until there are now no longer any physician referrals of patients to his offices.

Plaintiff would respectfully urge that the trial court and the Court of Appeals for the Sixth Circuit, erred in granting summary judgment, when there were presented numerous issues of material fact which were in dispute at the time of the Motion.

This Honorable Court, in addressing the standard of

review to be used in considering a Motion for Summary Judgment stated: "Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1985).

Your Plaintiff would urge that there is ample proof that Dr. Alexander became the target of Defendant Patterson's "banishment" activities after he learned about Dr. Alexander's testimony in Kentucky and in particular in the Elizabethtown, Kentucky malpractice case which was tried in the United States District Court.

The actions of Defendant and others are a clear violation of 42 U.S.C. 1985 (2) which prohibits a conspiracy between two or more persons:

B. To injure such party or witness in his person or property on account of his having so attended or testified.

Applying the standard of review announced by the U.S. Supreme Court in the Liberty Lobby decision, (supra), it is submitted, Summary Judgment was not appropriate in this case, to for the Court of Appeals to uphold the Trial Court's decision was clearly error.

3. The decisions of the Court of Appeals for the Sixth Circuit and the Trial Court disregard the provisions and protections afforded in 42 U.S.C. 1985 (2)

It is respectfully submitted that the Trial Court's decision and the decision of the United States Court of Appeals for the Sixth Circuit disregard the plain language of 42 U.S.C. 1985 (2), in that the decisions allow retaliatory activities by Defendant and others to go unchallenged.

The provisions of 42 U.S.C. 1985 (2) specifically prohibit two or more persons who **"injure any party of his witness. . . on account of his having so attended and testified."**

In this case, Summary Judgment was upheld, even though the Opinion of the Court of Appeals recites that Defendant and others, "confronted Alexander and tried to dissuade him from testifying in future cases. . . " (Opinion at Page Two) . . . and the conduct caused him damages.

The very language of the Court of Appeals in its Opinion in this case makes out the necessary elements of a 42 U.S.C. 1985 (2) cause of action.

It is respectfully submitted that if this decision is allowed to stand, any witness who testifies in a federal proceeding can be punished for that testimony and can not seek the protections and recompense which was to have been afforded to that witness through 42 U.S.C. 1985 (2).

CONCLUSION

For all the aforementioned reasons, it is respectfully urged that the decisions of the United States District Court and the United States Court of Appeals for the Sixth Circuit result in a miscarriage of justice, requiring the intervention of this Honorable Court.

Your Petitioner, through his undersigned counsel of record, would respectfully urge that justice requires this Petition be granted and the decisions of the United States District Court and the Court of Appeals for the Sixth Circuit be reviewed by this Honorable Court, and after briefing and argument, that those decisions be reversed and this matter be remanded for a trial by jury.

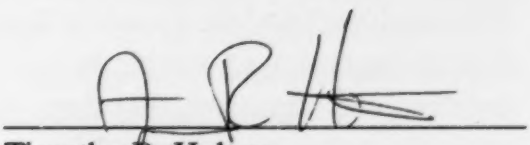
Respectfully
Submitted,

Alan Bryant Chambers
Attorney for Petitioner

Timothy R. Holton
Attorney for Petitioner
200 Jefferson Ave. #750
Memphis, Tennessee 38103
901-525-4297

CERTIFICATE OF SERVICE

The undersigned Timothy R. Holton, attorney for Petitioner, hereby certifies that three copies of the foregoing have been served on counsel for the Respondents, to Mr. John J. Thomason, attorney for Sam Patterson, M.D., One Commerce Square, 29th Floor, Memphis, TN, 38103, (901) 525-8721, and to Mr. Leo Bearman, attorney for SVMIC, First Tennessee Bank Building, 168 Madison Avenue, Memphis, TN, 38103, (901) 526-2000, via first class United States Mail, postage pre-paid, on November 7, 1994



Timothy R. Holton
Attorney for Petitioner

APPENDIX

Not For Publication

FILED
AUG 10, 1994
LEONARD GREEN, CLERK

No- 92-6424

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALBERT ALEXANDER, M.D.,

Plaintiff-Appellant,

v.

ON APPEAL from the United States District Court for the Western District of Tennessee

NOT RECOMMENDED FOR FULL-TEXED PUBLICATION
Sixth Circuit Rule 24 Limits citation to specific situations. Please see Rule 24 before citing in a proveeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

SAM PATTERSON, M.D., AND STATE VOLUNTEER MUTUAL INSURANCE COMPANY,

Defendants -Appellants.

Decided and Filed_____, 1994

Before: **KENNEDY, SILER**, and **BATCHELDER**, Circuit Judges.

SILER, Circuit Judge. Plaintiff Albert Alexander appeals from the summary judgment entered against him. Alexander claims that the district court erred in granting summary judgment on the merits of his 42 U.S.C. § 1985 claim[1] and in doing so while his discovery motion was pending. We affirm, though on grounds other than those relied on by the district court.

Background

Alexander and defendant Sam Patterson were physicians and colleagues at the University of Tennessee's Medical School.

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[1]Alexander had other claims under 42 U.S.C. § 1983, 15 U.S.C. §§ 1-2, and state law, but these have been abandoned on appeal.

Defendant State Volunteer Mutual Insurance Company ("SVMIC") provided medical malpractice insurance to both doctors. Patterson served on SVMIC's claims review committee. As early as 1978, Alexander began testifying as an expert witness in malpractice cases. He was rumored both to have offered questionable testimony and to be a "hired gun" for plaintiffs suing physicians. Upon hearing these rumors, Patterson sought information from SVMIC concerning cases in which Alexander testified. Once Patterson decided that the rumors were true, he and others confronted Alexander and tried to dissuade him from testifying in future cases. Alexander claims that this conduct has made him fearful when he testifies, prevented him from gaining membership in a health provider organization, caused him to lose physician referrals, and prompted his colleagues to shun him.

Analysis

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). In responding to a summary judgment motion, the non-moving party must set "forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). We review a district court's grant of summary judgment de novo. Lavado v. Keohane, 992 F.2d 601, 605 (6th Cir. 1993).

Additionally, we may affirm the district court for reasons other than those relied on by the district court.[2] Jarrett v. Kassel, 972 F.2d 1415, 1429 (6th Cir. 1992), cert. denied, 113 S. Ct. 1272 (1993).

Here, the propriety of summary judgment turns on the application of § 1985(2), which proscribes conspiracies that are "designed to obstruct the course of justice in the federal judicial system." Bradt v. Smith, 634 F.2d 796, 800-01 (5th Cir. Unit A Jan. 1981), cert. denied, 454 U.S. 830 (1981). Specifically, § 1985(2) prohibits conspiracies "to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such . . . witness . . . on account of his having so attended or testified." Parties raising claims under § 1985(2) must prove a conspiracy between two or more persons, to deter the claimant by force, intimidation, or threat from attending court or testifying freely in a pending matter, which causes injury to the claimant. See Rutledge v. Arizona Bd. of Regents, 859 F.2d 732, 735 (9th Cir. 1988). The district court did not err in granting summary judgment against Alexander because Alexander's proof, that Patterson served on SVMIC's claims review committee and requested information from SVMIC, without more, does not raise a genuine issue as to whether Patterson and SVMIC conspired against him.

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[2]The district court resolved the claim under 42 U.S.C. § 1985 by finding that, although Alexander alleged that Patterson and SVMIC conspired to prevent him from testifying in medical malpractice cases, he did not prove that he was hindered from testifying "freely, fully, and truthfully" or that the alleged conspiracy involved a federal court proceeding. We leave to another day the question whether § 1985 provides a cause of action for witnesses who are not parties, see David v. United States, 820 F.2d 1038, 1040 (9th Cir. 1987), as we find there is no proof of a conspiracy.

Alexander also argues that the district court erred in granting summary judgment without ruling on his motion to compel, which was then pending. Alexander sought, through this motion, discovery of information concerning a case defended by a medical group to which Patterson belonged and information relating to other cases examined by Patterson as a member of SVMIC's claims review committee. However, this information is immaterial because Alexander has no cause of action under § 1985. See Elvis Presley Enter. Inc. v. Elvisly Yours. Inc., 936 F.2d 889, 895 (6th Cir. 1991) ("A failure of proof concerning an essential element ... renders all other facts immaterial"). Therefore, even if the district court erred in granting summary judgment without ruling on Alexander's motion, the error was harmless.

For the foregoing reasons, we AFFIRM the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ALBERT ALEXANDER, M.D.
Plaintiff,
VS.
SAM PATTERSON, M.D.,
et al.,

Defendants.

No. 90-2474-G



ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DISMISSING PENDENT STATE CLAIMS

Before the court are the motions for summary judgment of defendant Dr. Sam Patterson and defendant State Volunteer Mutual Insurance Company (SVMIC). Plaintiff Dr. Albert Alexander originally filed suit in this matter on July 8, 1990, against eight defendants, seeking monetary damages for the alleged deprivation of his constitutional rights in violation of 42 U.S.C. §§ 1983 and 1985(2), and for monopolization and boycott in violation of the Sherman Act, 15 U.S.C. § 1 and 2. Plaintiff also brought pendent state law claims of slander, intentional infliction of emotional distress, unfair competition, disparagement, and tortious interference with his business.

On July 31, 1991, this court dismissed all of plaintiff's claims under § 1983 and § 1985(2) against several of the original defendants. The court also dismissed plaintiff's antitrust claims and his state law claims for slander, unfair competition and negligent or intentional infliction of emotional distress against all of the defendants.

This document entered on docket sheet in compliance with Rule 58 and/or 10 (a) FRCP on 10-16-92

After this order was entered, plaintiff voluntarily dismissed his remaining claims against three of the defendants. Plaintiff's only remaining claims are those brought against defendants Patterson and SVMIC under § 1983, § 1985(2), and state common law for disparagement and tortious interference with business.

Federal Rule of Civil Procedure 56 provides that a motion for summary judgment shall be granted if, based on the record as a whole, "there is no genuine issue as to any material fact and... the moving party is entitled to judgment as a matter of law." In a motion for summary judgment, the moving party "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as the inferences drawn therefrom must be read in the light most favorable to the party opposing the motion." Kochins v. Linden-Alimak. Inc., 799 F.2d 1128, 1133 (6th Cir. 1986).

When confronted with a properly supported motion for summary judgment pursuant to Rule 56(e), the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." A genuine issue of material fact exists "if the evidence [presented by the non-moving party] is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. It is not the movant's responsibility to disprove an issue upon which the plaintiff bears the burden of proof. The non-moving party must "go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

1. Plaintiff's § 1983 claim Plaintiff's claim under § 1983 alleges that Patterson and SVMIC violated Alexander's rights under the First Amendment to the United States Constitution by taking action to remove him from his position on the teaching faculty of the University of Tennessee Medical School because he testified for the plaintiffs in numerous medical malpractice cases.[1]

Plaintiff has offered no support beyond the simple allegations made in his complaint and deposition that he was considered for removal from the teaching faculty because he testified for or otherwise supported plaintiffs in malpractice actions. Alexander's removal was first discussed in a meeting of the Residents Advisory Committee at Baptist Hospital East, where several of the residents related to Dr. Ryan that they were uncomfortable working with Alexander. Alexander was apparently not the only doctor whom the residents requested be removed from

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[1] In an order entered July 31, 1991, on defendants' motion to dismiss, or in the alternative, for summary judgment, this court dismissed plaintiff's procedural due process claim brought under § 1983 on the ground that plaintiff had not alleged that he had been deprived of a protected property interest. Plaintiff's § 1983 claim alleging that defendants had conspired to violate his First Amendment rights by attempting to have him removed from the University of Tennessee faculty remains before the court. See Order on Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, July 31, 1991, at 8.

The court should note that plaintiff originally alleged that some of the original eight defendants had conspired to eliminate his referral business in the area of infertility medicine. Having now conducted discovery, plaintiff has offered no evidence linking Patterson or SVMIC to a decline in his referral business, nor has he even addressed the issue directly in his responses to defendants' motions for summary judgment. Defendants have, however, offered substantial evidence tending to show that any decline in plaintiff's referral business is attributable to factors far outside their control.

the list of teaching faculty. Defendant Patterson is not alleged to have been at the meeting, nor is it alleged that he attempted to influence the residents to ask for Alexander's removal.

In a letter from Dr. George M. Ryan, Jr., a professor at the University of Tennessee, to Patterson, who was the Chief of Residents at the time, Ryan stated that the University of Tennessee residents at Baptist Hospital East had requested that Alexander be removed from the teaching faculty. The depositions of Dr. Pat Morgan, Dr. Marion Larson-McCord, and Dr. Nancy Klein overwhelmingly support Ryan's statements to Patterson in the letter. The record reveals that a number of residents had very specific complaints about Alexander, including several examples of inappropriate behavior. Alexander has offered nothing to counter or even explain the evidence the defendants have provided regarding the reason he was considered for removal.

According to Ryan's deposition, defendant Patterson was very reluctant to have Alexander removed. Patterson spoke favorably of Alexander in a meeting he had with Ryan in which they discussed the removal of doctors from the faculty. It appears from the record that Alexander has not been, to this day, removed from the faculty at the University of Tennessee, despite the recommendation of the residents. It appears quite possible that Alexander was not removed because of Patterson's support, and because Patterson was willing to excuse Alexander's behavior because Alexander was "competent" but "having a difficult time" when the issue was first discussed.

Plaintiff has offered no evidence connecting SVMIC in any way with the issue of his removal from the teaching faculty at the University of Tennessee.[2] The only possible connection that

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[2] SVMIC is a proper defendant in plaintiff's § 1983 claim because it is alleged to have conspired with a state actor to deprive plaintiff of his constitutional rights.

plaintiff makes is the fact that Patterson is a member of SVMIC's claims review board, a committee of doctors that reviews the medical records related to malpractice actions filed against doctors insured by SVMIC. Alexander alleges that because Patterson as a member of SVMIC's claims adjustment board (and perhaps discussed Alexander's testimony in medical malpractice with SVMIC officers or members of that board), there was therefore a conspiracy between Patterson and SVMIC to have Alexander removed from the faculty at the University of Tennessee.

Alexander has not come forth with any evidence linking Patterson to his removal from the faculty, much less raised a genuine issue for trial as to SVMIC's involvement.[3] Patterson and SVMIC, on the other hand, have established that Alexander was considered for removal on the residents' recommendation. - There is no doubt that Patterson generally disapproved of doctors testifying for a fee against other doctors in medical malpractice cases, nor is there any doubt that SVMIC has a financial stake in many of the medical malpractice actions that are tried in Tennessee. Alexander, however, has not linked Patterson's disapproval or SVMIC's financial interest to any injury or threat of injury to himself.

There is no genuine issue of material fact regarding the alleged deprivation of plaintiff's First Amendment rights. Plaintiff has offered nothing beyond a mere allegation that defendants violated his First Amendment rights, and has not connected either Patterson or SVMIC with an attempt or a conspiracy to have him removed from the University of Tennessee teaching faculty. The motions of defendants Patterson and SVMIC for summary judgment on plaintiff's § 1983 claim are therefore granted.

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[3] Alexander was quite clear in his deposition that he was unaware of any specific activity by or on behalf of SVMIC that had injured him or interfered with his business. The discovery conducted by Alexander and filed with this court discloses no basis for concluding that SVMIC attempted to have Alexander removed from the University of Tennessee faculty.

2. Plaintiff's § 1985(2) Claim Defendants also argue that there are no facts to support plaintiff's claim under 42 U.S.C. § 1985(2). Section 1985(2) provides, in relevant part, that there shall be a violation:

> [I]f two or more persons in any state or territory conspire to deter by force, intimidation, or by threat, any party or witness in any court of the United States from attending such court, or from testifying to any part pending therein, freely, fully, and truthfully, or to injure any party or witness in his personal property on account of his having so attended or testified . . . .

In its order on defendant's motion to dismiss, entered on July 31, 1991, this court found that plaintiff did state a claim under § 1985(2) because he had testified in federal courts in medical malpractice actions and had sufficiently alleged a conspiracy between the defendants to deter such future testimony. The court must now address defendants' motions for summary judgment on plaintiff's § 1985(2) claim.

The court has very little guidance in interpreting § 1985(2), particularly with regard to the first part of that section.[4] But having now examined in greater detail plaintiff's specific allegations, the support offered for those allegations, and the cases construing § 1985(2), the court finds that defendant's motion for summary judgment should be granted.

Section 1985(2) does not in itself provide a cause of action for violations of the section. The cause of action is found in the final clauses of § 1985(3), which provides "...the party so injured or deprived may have an action for the recovery of

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4 See, e.g., Allen v. Allied Plant Maintenance Co., 636 F. Supp. 1090 (M.D. Tenn. 1986) (citing Brawer v. Horowitz, 535 F.2d 830, 837 (3rd Cir. 1976), construing the "perfidious syntax of § 1985 (2) with some reserve" given the "dearth of authority to light the way").

damages occasioned by such injury or deprivation, against any one or more of the conspirators." See Rylewicz v. Beaton Services, Ltd., 888 F.2d 1175, 1180 (7th Cir. 1989).

To establish a claim under the first part of § 1985(2),[5] the plaintiff must show (l) a conspiracy between two or more persons, (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiff. David v. United States, 820 F.2d 1038 (9th Cir. 1987). See also Miller v. Glen & Helen Aircraft, Inc., 777 F.2d 496, 498 (9th Cir. 1985); Chahal v. Paine Webber, Inc., 725 F.2d 20, 23 (2d Cir. 1984).

The intent of § 1985(2) is to prevent conspiracies "the object of which is intimidation of or retaliation against parties or witnesses, or grand or petit jurors, in any court of the United States." Brawer v. Horowitz, 535 F.2d 830, 840 (3rd Cir. 1976); Hahn v. Sargent, 523 F.2d 461, 469 (lst Cir. 1975), cert. denied, 425 U.S. 904 (1976). The statute is concerned with conspiracies involving perjury, subornation of perjury, or criminal obstruction of justice. McCord v. Bailey, 636 F.2d 606, 614-17 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981). An action under §1985 (2) must therefore involve the intimidation of witnesses, parties or court officers in an ongoing federal proceeding, and there must be a connection between the conspiracy and the witness, party, or juror. Alsup v. International Union of Bricklayers, 679 F.Supp. 716, 720 (N.D. Ohio 1987). There can be no violation of § 1985(2) unless the plaintiff establishes a nexus between an alleged conspiracy and a federal court proceeding. Allen v. Allied Plant Maintenance Co., 636 F.Supp. 1090, 1093 (M.D. Tenn.

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[5] Plaintiff has made no allegation of class-based animus, and therefore cannot sustain an action under the second half of § 1985(2), which proscribes conspiracies to deny or interfere with equal protection rights. Allen v. Allied Plant Maintenance, 636 F.Supp; 1090, 1093 (M.D. Tenn. 1986). See also Bretz v. Kelman, 773 F.2d 1026, 1029-30 (9th Cir. 1985).

1986). See also Bretz v. Kelman, 773 F.2d 1026, 1029-30 (9th Cir. 1985); Bradt v. Smith, 634 F.2d 796, 801 (5th Cir.), cert. denied, 454 U.S. 830 (1981).

Although Alexander alleges that Patterson and SVMIC conspired to prevent him from testifying for the plaintiff in medical malpractice actions, in both federal and state court, plaintiff has not alleged that he has been in any way injured or deterred from testifying in any particular proceeding in federal court. In particular, plaintiff has not established or even alleged that he was actually hindered from testifying "freely, fully and truthfully" at any time since the alleged conspiracy began, or that the alleged conspiracy has involved any federal proceeding.

Nor has plaintiff sufficiently alleged that defendants' conspiracy has resulted in any injury to him on account of his having "attended or testified" in past cases in federal court. At his deposition, Alexander could not state the number of times he has testified in court or been deposed in medical malpractice cases and could not remember the specific number of times he has testified for or consulted with plaintiffs in such cases during the last year. He has not provided any evidence or support beyond his allegations that he has been hampered or deterred from testifying in malpractice cases in federal court, or that he has been retaliated against because of his testimony. Where the witness or party is not hampered or deterred from testifying in a federal proceeding, there is no deprivation of rights or injury as required by § 1985 (2). Rylewicz v. Beaton Services Ltd., 888 F.2d 1175, 1178 (7th Cir. 1989).

Because plaintiff has failed to allege a sufficient nexus between the alleged conspiracy and an on-going federal proceeding, or that he has actually been deterred from testifying in federal court, defendants' motions for summary judgment on plaintiff's § 1985(2) claim are therefore granted.

3. Pendent state claims The only remaining claims before the court are plaintiff's pendent state law claims for disparagement and tortious interference with his business. Having dismissed plaintiff's federal claims under 42 U.S.C. §§ 1983 and 1985(2), and because there is no diversity jurisdiction under 28 U.S.C. § 1332 as all the parties reside in Tennessee, this court should not exercise jurisdiction over these state law claims. Pendent jurisdiction is a doctrine of discretion; "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. at 726.

For the reasons stated, defendants' motions for summary judgment on plaintiff's claims under 42 U.S.C. §§ 1983 and 1985(2) are granted, and plaintiff's pendent claims under Tennessee law for disparagement and tortious interference with business are dismissed without prejudice.

IT IS SO ORDERED.

Julia Smith Gibbons

JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

October 14, 1992

DATE

Supreme Court, U.S.
FILED
DEC 6 1994
OFFICE OF THE CLERK

No. 94-836

In The

Supreme Court of the United States

October Term, 1994

ALBERT ALEXANDER, M.D.,

Petitioner,

v.

SAM PATTERSON, M.D., and STATE VOLUNTEER MUTUAL INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT SAM PATTERSON, M.D., IN OPPOSITION

JOHN J. THOMASON
THOMASON, HENDRIX, HARVEY, JOHNSON & MITCHELL
Attorney of Record for Respondent Sam Patterson, M.D.
One Commerce Square
29th Floor
Memphis, Tennessee 38103
(901) 525-8721

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26 pp

QUESTION PRESENTED FOR REVIEW

Whether a motion for summary judgment was properly granted when the nonmoving party with the burden of persuasion offered no proof of conspiracy or damages or of a violation of a federally secured right by either of the two alleged conspirators?

PARTIES TO THE PROCEEDING

Albert Alexander, M.D., Petitioner

Attorney of Record:
Timothy R. Holton
Chambers, Crow, Durham & Holton
200 Jefferson Avenue Suite 750
Memphis, Tennessee 38103
(901) 525-4297

Sam Patterson, M.D., Respondent

Attorney of Record:
John J. Thomason
Thomason, Hendrix, Harvey, Johnson & Mitchell
2900 One Commerce Square
Memphis, Tennessee 38103
(901) 525-8721

State Volunteer Mutual Insurance Company, Respondent

Attorney of Record:
Leo M. Bearman
Baker, Donelson, Bearman & Caldwell
First Tennessee Building
165 Madison Avenue
Memphis, Tennessee 38103
(901) 526-2000

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JURISDICTION

Pursuant to Supreme Court Rule 24.2, Respondent adopts Petitioner's statement as to this Court's jurisdiction.

I. STATEMENT OF THE CASE

Pursuant to this Honorable Court's Rules, *see* Sup. Ct. R. 15.1 ("Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later."), 24.2 ("no statement of the case need be made beyond what may be deemed necessary to correct any inaccuracy or omission in the statement by the other side"), and in light of the nature of Petitioner's Statement of the Case, Respondent is compelled to restate the facts of this case including the decisions below. As Petitioner has abandoned all but his claim under Section 1985(2), this brief will address that claim only.

Petitioner, Dr. Albert Alexander, is a physician specializing in obstetrics and gynecology (hereafter "OB-GYN") who has testified and continues to testify as a paid expert witness in medical malpractice cases.

Respondent, Dr. Sam Patterson, is a physician specializing in OB-GYN. Dr. Patterson also serves as a member of a claims review committee of Respondent, State Volunteer Mutual Insurance Company. Dr. Patterson and Dr. Alexander attended medical school together and remained close friends for many years thereafter.

Respondent, State Volunteer Mutual Insurance Company (hereafter "SVMIC"), is an insurer that provides professional liability coverage for physicians practicing in Tennessee, including Petitioner, Dr. Alexander, and Respondent, Dr. Patterson.

Petitioner, Dr. Alexander, originally brought this lawsuit against five fellow physicians, the medical college from which he graduated (and on whose faculty he serves), the hospital where he practices, and his medical malpractice insurance carrier for conspiracy to prevent him from testifying as an expert in medical malpractice actions or punishing him therefor. He also made claims for violations of anti-trust laws, slander, intentional infliction of emotional distress, unfair competition, and tortious interference with business relations. As the litigation progressed, many of the named parties were dismissed, and the action was limited by the district court to civil rights claims and supplemental state tort claims. After pleading and discovery, all defendants were dismissed except Respondents SVMIC and Dr. Sam Patterson. Petitioner has now abandoned all claims except Section 1985(2).

Petitioner's claim under Section 1985(2) arises from the actions of Dr. Patterson who is a physician and is also a member of the SVMIC claims review committee.

When Dr. Patterson heard rumors that his friend Dr. Alexander had offered questionable testimony as an expert in medical malpractice cases, Dr. Patterson, acting on his own, sought information about the cases in which Dr. Alexander had testified. Acting out of concern for his colleague and friend, Dr. Patterson confirmed the rumors that Dr. Alexander had testified as to medical procedures about which he had no experience. Dr. Patterson wrote to Dr. Alexander imploring him to reconsider what he was doing and "testify about things truthfully and in the areas of his experience." (Docket Entry No. 63D; Deposition of Dr. Sam Patterson at 279.) Subsequently, at Dr. Alexander's request, Dr. Patterson and two other physician friends met with Dr. Alexander to review his expert witness files and afterwards attempted to dissuade him from testifying as an expert in areas where he had no expertise and from offering untrue testimony in areas where he was qualified. This effort bore no fruit, and the relationship between Drs. Alexander and Patterson and the other physicians began to deteriorate. Dr. Alexander continued to testify as to matters outside his expertise.

Sometime later, after he became Director of University of Tennessee Residents at Baptist Hospital East, Dr. Patterson was approached by Dr. George Ryan concerning Alexander's performance as a member of the University faculty. Dr. Ryan had received several complaints from the residents who had objected to working with Dr. Alexander for reasons ranging from unprofessional behavior to intimidating residents. (Docket Entry No. 73B; Deposition of Dr. George Ryan at 64-71.) Dr. Ryan was considering removing Dr. Alexander from the faculty but was persuaded not to do so by Dr. Patterson who

vouched for Dr. Alexander's competence. In fact, Dr. Alexander remains on the faculty today. The relationship between Drs. Alexander and Patterson continued to sour, however, until ultimately this lawsuit ensued.

After substantial discovery, the district court granted Respondent's motion for summary judgment and determined that Petitioner's civil rights claims failed to meet the standard under rule 56, Fed. R. Civ. Pro. 56, as construed by this Court. The district court found that Dr. Alexander had failed to establish any proof in support of his allegations that Dr. Patterson and SVMIC had taken action to deter him from testifying as an expert in medical malpractice proceedings. In fact, there is no evidence in the record that SVMIC encouraged or even knew about any of Dr. Patterson's inquiries into Dr. Alexander's activities or participated in those inquiries, (Docket Entry No. 84; Deposition of Dr. Sam Patterson at 230-31), or that Patterson did anything to prevent Alexander from testifying, (Docket Entry 63C; Deposition of Dr. Albert Alexander at 239-41), or that Alexander has been prevented from testifying, (Docket Entry No. 63C; Deposition of Dr. Albert Alexander at 239-41), or that Patterson has injured or damaged him in any way. (Docket Entry Nos. 63A and 63C; Deposition of Dr. Albert Alexander at 112-15, 196-201, 216-218.) The state claims were dismissed under the *Gibbs* Doctrine. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed.2d 218 (1966).

Petitioner's Statement of the Case contains misstatements of fact and misleading assertions as to the decisions of the courts below.

1.

Contrary to Petitioner's assertion, the district court did not "rule[] that Plaintiff had made out the necessary showing of a conspiracy," (Pet. for Writ of Cert. at 4), in its order granting summary judgment. Rather, the district court stated that Petitioner "had sufficiently *alleged* a conspiracy between the defendants," such that the claim under Section 1985(2) could survive a motion to dismiss for failure to state a claim upon which relief may be granted. *Alexander v. Patterson*, No. 90-2474-G, slip op. at 7 (W.D. Tenn. Oct. 16, 1992) (emphasis added) (Pet'r App. at 23.) On the motion for summary judgment, the district court, assuming a conspiracy *arguendo*, found Petitioner had not alleged "a sufficient nexus between the *alleged* conspiracy and an on-going federal proceeding, or that he has actually been deterred from testifying in federal court." *Alexander v. Patterson*, No. 90-2474-G, slip op. at 10 (W.D. Tenn. Oct. 16, 1992) (emphasis added) (Pet'r App. at 25.) The district court never determined as a factual matter that there was a conspiracy.

2.

In his petition, Dr. Alexander refers to the term "hired gun" as used by Dr. Patterson, but never gives Dr. Patterson's definition of the term. Petitioner defines the term as "his [Dr. Patterson's] pejorative for plaintiffs' experts in medical malpractice cases." (Pet. for Writ of Cert. at 7.) The record of this cause reveals that Dr. Patterson has explained the precise meaning of the term on several occasions as being an "expert" who will testify concerning subjects outside his expertise, (Docket Entry

No. 63D; Deposition of Dr. Sam Patterson at 248), or as being an expert "who will testify that something's true that's not true, for money." (Docket Entry No. 63D; Deposition of Dr. Sam Patterson at 68.)

3.

Petitioner asserts that because of Dr. Patterson's efforts to dissuade him from giving untrue testimony, the court of appeals "concludes that such actions cause Plaintiff [Dr. Alexander] to be damaged." (Pet. for Writ of Cert. at 6.) There is, in fact, no such conclusion by the court of appeals. Throughout the discovery and in all of the proceedings in this cause to date, Dr. Alexander has not identified any case in which he has not testified, or expert fee he has declined because of the actions of either of the Respondents. In his deposition, Dr. Alexander was repeatedly asked to identify any *fact* that supports his allegations that Respondents did anything to ostracize him or to bring economic or professional pressure to bear upon him for testifying as an expert in medical malpractice cases or to wrongfully interfere with his business. He was unable to point to any fact in support of those allegations. (Docket Entry No. 75; Deposition of Dr. Albert Alexander at 409-15.) Dr. Alexander, on the other hand, would not disclose his income from litigation activities so as to give the courts below a means by which to gauge whether he has or has not been adversely affected. (Docket Entry No. 63A, 63C, Deposition of Dr. Albert Alexander at 91, 449.)

On appeal, a panel of the United States Court of Appeals for the Sixth Circuit, held that, "Alexander's

proof, that Patterson served on SVMIC's claims review committee and requested information from SVMIC, without more, does not raise a genuine issue as to whether Patterson and SVMIC conspired against him." *Alexander v. Patterson*, No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Pet'r App. at 16.) But, in his Petition, Dr. Alexander states that "the Sixth Circuit held that Plaintiff had shown that he was damaged." (Pet. for Writ of Cert. at 5.) In fact, the Sixth Circuit did not so hold. In his Petition, Dr. Alexander states that "the Sixth Circuit *found* that Defendant and, 'others,' took actions which harmed the Plaintiff." (Pet. for Writ of Cert. at 6.) (emphasis added) (emphasis deleted). There is no such finding in the Sixth Circuit's opinion. The only possible excerpt upon which Petitioner may base such a conclusion is the following quotation from the "Background" section of the court's opinion:

> Alexander *claims* that this conduct has made him fearful when he testifies, prevented him from gaining membership in a health provider organization, caused him to lose physician referrals, and prompted his colleagues to shun him.

Alexander v. Patterson, 92-6424, slip op. at 2 (6th Cir. Aug. 10, 1994) (emphasis added) (Pet'r App. at 15.) A court's "finding" is distinct from a recitation of an allegation.

Respondent respectfully submits that the foregoing discussion and clarification of the misstatements in the Petition demonstrates inaccuracies in the Petition sufficient to constitute ground for a Rule 14.5 denial of the Petition.

II. SUMMARY OF ARGUMENT

1. The Court of Appeals for the Sixth Circuit did not depart from the accepted and usual course of judicial proceedings so as to require this Honorable Court to exercise its power of supervision by holding that Petitioner's bare allegations did not establish the conspiracy necessary to state a claim under Section 1985(2). Petitioner failed to set forth facts to support the allegations in the pleadings that Respondents conspired to deprive Petitioner of his rights. To withstand a motion for summary judgment, the nonmovant cannot rest on his pleadings.

2. The district court properly construed Section 1985(2) to require that Petitioner must show a nexus between the alleged conspiracy and the right sought to be vindicated under the statute. The remedy provided under Section 1985(2) requires that Petitioner be denied or deterred from testifying either presently or in future cases, and he has failed to make that showing. In fact, Petitioner states that he continues to testify and intends to do so in the future.

3. The record clearly supports the basis upon which the Court of Appeals affirmed the district court's decision.

III. REASONS FOR DENYING THE PETITION

1. The unsupported allegations of Petitioner do not establish a genuine issue of material fact as to whether the Respondents conspired to deprive Petitioner of his rights under Section 1985(2) sufficient to withstand a motion for summary judgment.

To withstand a motion for summary judgment, the nonmovant (Alexander) who bears the burden of persuasion at trial cannot rest on the pleadings, but must go beyond the pleadings and "designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986) (quoting Fed. R. Civ. P. 56). Although reasonable inferences are given to the nonmovant, *see Celotex*, 477 U.S. at 317, the party moving for summary judgment can prevail by pointing out to the court that "there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 324.

In the courts below, Dr. Alexander could not show the conspiracy necessary to support a Section 1985(2) claim, *Alexander v. Patterson*, No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Pet'r App. at 16), nor was there evidence of any intimidation, threat or force used against him by Dr. Patterson or SVMIC. *Alexander v. Patterson*, No. 90-2474-G, slip op. at 10 (W.D. Tenn. Oct. 16, 1992) (Pet'r App. at 24-25.)

Conceptually, a civil conspiracy is illusive to define. The decisions agree, however, that to establish the claim, there must be some form of agreement between the actors. *Sampson v. Village Discount Outlet, Inc.*, 832 F.

Supp. 1163, 1168 (N.D. Ill. 1993) ("An additional basis for denying [a plaintiff's] claim under § 1985(2) is his failure to demonstrate the existence of a conspiratorial agreement between the defendants."); *see also Constitution Bank v. DiMarco*, 836 F. Supp. 304 (E.D. Pa.), *affirmed*, 27 F.3d 556 (1993); *Myatt v. City of Chicago*, 816 F. Supp. 1259 (N.D. Ill. 1992); *McKenzie v. Doctor's Hospital of Hollywood, Inc.*, 765 F. Supp. 1504 (S.D. Fla. 1991); *Petroleum Energy, Inc. v. Mid-America Petroleum, Inc.*, 775 F. Supp. 1420 (D. Kan. 1991). Because a conspiracy is an essential element of a claim under Section 1985(2), Petitioner bears the burden of persuasion at trial of establishing a conspiracy. Petitioner, however, failed to produce more than his bare allegations. As the court of appeals succinctly stated:

> The district court did not err in granting summary judgment against Alexander because Alexander's proof, that Patterson served on SVMIC's claims review committee and requested information from SVMIC, without more, does not raise a genuine issue as to whether Patterson and SVMIC conspired against him.

Alexander v. Patterson, No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Pet'r App. at 16.) After months of discovery and countless depositions of various doctors allegedly involved in the conspiracy, Petitioner can muster nothing more to substantiate his claims than he could at the time of filing his original complaint. The record buttresses this. There is no evidence in the record that Dr. Patterson was asked to be a member of the claims review committee of SVMIC because of his concern about Dr. Alexander's questionable expert testimony. Furthermore, Dr. Patterson states that all of his actions in this case

relative to Dr. Alexander were his own and motivated by feelings of personal concern and friendship toward Dr. Alexander and that SVMIC was completely unaware of those activities. (Docket Entry No. 84; Deposition of Dr. Sam Patterson at 230-31, 248.) Dr. Patterson was not acting on behalf of SVMIC during any of his conversations with Alexander or with others about Alexander, nor was SVMIC aware that the conversations took place.

Furthermore, Petitioner's own statements reveal the absence of any conspiracy including Dr. Patterson. When asked specifically on what facts he based the allegation that Dr. Patterson devised a plan, Alexander responded as follows:

> He announced that – he stated that Dr. Ryan had called him in and asked him to remove me from the clinical faculty and that he said he didn't want to do that, . . .

(Docket Entry No. 75; Deposition of Dr. Albert Alexander at 114.)

A case should not be sent to a jury when there is only a mere scintilla of evidence to support a plaintiff's theory. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986); *see also Sadek v. Nashville Recycling Co.*, 751 S.W.2d 428 (Tenn. App. 1988). A plaintiff's verdict in a conspiracy case, furthermore, must not be based on inference, conjecture, or speculation, but must be based on substantial and material evidence. *Sampson v. Village Discount Outlet, Inc.*, 832 F. Supp. 1163,

1168 (N.D. Ill. 1993) ("Unsupported inferences and conclusions are insufficient to support a claim of conspiracy."); *see also Sadek*, 751 S.W.2d at 428; *Bowers v. Potts*, 617 S.W.2d 149 (Tenn. App. 1981).

The allegations of Petitioner, unsupported by facts, do not establish that there is a genuine issue as to whether Respondents, Dr. Patterson and SVMIC, conspired to deprive Petitioner of his rights under Section 1985(2).

2. The district court properly determined that Section 1985(2) requires a nexus between an alleged conspiracy and the right sought to be vindicated under the statute.

The Section 1985(2) claim for a deprivation of federally protected rights includes an action based on a conspiracy to deter someone from testifying freely, fully, and truthfully in an on-going federal proceeding. *See Kush v. Rutledge*, 460 U.S. 719, 103 S. Ct. 1483, 75 L. Ed.2d 413 (1983). The other action available to Petitioner provides a remedy for a witness who is injured "in his person or property on account of his having so attended or testified." 42 U.S.C. § 1985(2) (1988).

These so-called "witness intimidation" provisions protect against purely private conspiracies aimed at impeding the administration of justice in the federal courts. *See Kush v. Rutledge*, 460 U.S. at 424-26. The district court addressed the issue of whether Petitioner had established that he had suffered any harm "at any time since the *alleged* conspiracy began." *Alexander v. Patterson*, No. 90-2474-G, slip op. at 7 (W.D. Tenn. Oct. 16, 1992)

(emphasis added) (Pet'r App. at 25.) Without addressing whether Petitioner had met his burden under rule 56, Fed. R. Civ. P. 56, for establishing a conspiracy, the district court reasoned as follows:

> Although Alexander alleges that Patterson and SVMIC conspired to prevent him from testifying for the plaintiff in medical malpractice actions, in both federal and state court, plaintiff has not alleged that he has been in any way injured or deterred from testifying in any particular proceeding in federal court. In particular, plaintiff has not established or even alleged that he was actually hindered from testifying 'freely, fully and truthfully' at any time since the alleged conspiracy began, or that the alleged conspiracy has involved any federal proceeding.
>
> Nor has plaintiff sufficiently alleged that defendants' conspiracy has resulted in any injury to him on account of his having 'attended or testified' in past cases in federal court. At his deposition, Alexander could not state the number of times he has testified in court or been deposed in medical malpractice cases and could not remember the specific number of times he has testified for or consulted with plaintiffs in such cases during the last year. He has not provided any evidence or support beyond his allegations that he has been hampered or deterred from testifying in malpractice cases in federal court, or that he has been retaliated against because of his testimony. Where the witness or party is not hampered or deterred from testifying in a federal proceeding, there is no deprivation of rights or injury as required by § 1985(2).

Alexander v. Patterson, No. 90-2474-G, slip op. at 7 (W.D. Tenn. Oct. 16, 1992) (Pet'r App. at 25); *see also, e.g., Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985); *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976). When the party alleges a deprivation under Section 1985, he must show an injury resulting therefrom. *See Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175 (7th Cir. 1989). A direct injury from the alleged conspiracy is an essential element of proof for a Section 1985(2) violation. *See Koehler v. Cummings*, 380 F. Supp. 1294 (W.D. Tenn. 1971). And without an injury resulting in damage, an action for civil conspiracy cannot be established. *See id.*

Despite the findings of the district court and the proof in the record, including Petitioner's own responses, he insists that this Court should review his claim because, as Petitioner states:

> The Opinion recites that:
>
> " . . . [H]e, {Defendant Patterson} [sic] and others, confronted Alexander and tried to dissuade him from testifying in future cases[.]" and [sic] concludes that such actions caused Plaintiff to be damaged.

(Pet. for Writ of Cert. at 6.) Despite the thinly veiled attempt to attribute a conclusion to the court of appeals which it clearly did not reach, Petitioner misses the point. The district court determined that there was no nexus between the alleged conspiracy and either present or future testimony in federal trials. Petitioner's blanket allegation of "damage" sounds in tort which is where this claim would be heard, if at all. *See Griffin v. Breckenridge*, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed.2d 338 (1971) ("That

the statute [§ 1985(3)] was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others."); *see also Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 348 (5th Cir. 1981). The civil rights legislation is not intended to encompass all alleged injuries that do not rise to the level of constitutional or statutory deprivations but are, in essence torts. *See Griffin*, 403, U.S. at 88; *see also Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed.2d 420 (1981). The primary concern of Dr. Alexander, or so it appears from the record, is that he is being damaged in his reputation among the medical community by giving questionable testimony in medical malpractice cases. The district court stated that:

> To establish a claim under the first part of § 1985(2), the plaintiff must show (1) a conspiracy between two or more persons, (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiff.
>
> The intent of § 1985(2) is to prevent conspiracies "the object of which is intimidation of or retaliation against parties or witnesses, or grand or petit jurors, in any court of the United States." The statute is concerned with conspiracies involving perjury, subornation of perjury, or criminal obstruction of justice. An action under § 1985(2) must therefore involve the intimidation of witnesses, parties or court officers in an ongoing federal proceeding, and there must be a connection between the conspiracy and the witness, party, or juror. There can be no

> violation of § 1985(2) unless the plaintiff establishes a nexus between an alleged conspiracy and a federal court proceeding.

Alexander v. Patterson, No. 90-2474-G, slip op. at 7 (W.D. Tenn. Oct. 16, 1992) (citations omitted) (footnote omitted) (Pet'r App. at 25); *see also David v. United States*, 820 F.2d 1038 (9th Cir. 1987); *Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496, 498 (9th Cir. 1985); *Chahal v. Paine Webber, Inc.*, 725 F.2d 20, 23 (2d Cir. 1984). Although the district court did not reach the question of whether Petitioner had established a conspiracy, the court was justified in dismissing Petitioner's claim on the ground that he had not alleged a nexus between the alleged conspiracy and the harm sought to be remedied under Section 1985(2).

The district court correctly found that Petitioner had failed to establish any genuine issue of material fact sufficient to overcome the pending motions for summary judgment. Because Petitioner failed to identify a genuine issue of material fact upon which liability could be found on the part of Dr. Sam Patterson and SVMIC, the district court properly granted the motion for summary judgment. The district court was presented with substantial testimony which undermined Dr. Alexander's conclusions and allegations. In viewing the proof presented by Dr. Alexander, the district court found a string of vague conclusions and unrelated events which, Dr. Alexander claims, formed some elaborate "plan" to discredit him spear-headed by Dr. Patterson. *Compare Sampson*, 832 F. Supp. at 1168 ("[A plaintiff] is required to show that there was 'a single plan, the essential nature and general scope of which was known to each person who is to be held responsible for its consequences.' ") (quoting *Lenard v.*

Argento, 699 F.2d 874, 883 (7th Cir. 1983)). Petitioner's proof, however, consists of conjecture, speculation and inference. The facts presented to the trial court by deposition testimony do not support the inferences drawn by Dr. Alexander. As Dr. Patterson stated:

> Well, I wasn't doing it [investigating] representing the insurance company. Albert was just my good friend about whom there was bad gossip going on and I didn't believe it was really true and I wanted to find out if that's what really what was going on.

(Docket Entry No. 63D; Deposition of Dr. Sam Patterson at 231.) When asked if he was keeping anyone appraised of his progress in trying to dissuade Dr. Alexander from giving untrue testimony, Dr. Patterson stated:

> Well, there wasn't any progress. I just made these three or four phone calls one morning. That was it. There wasn't anybody to appraise of the progress.

(Docket Entry No. 63D; Deposition of Dr. Sam Patterson at 234.) There was no proof available to the district court that anyone acted with Dr. Patterson to deter Dr. Alexander by force, threats, or intimidation. The word "force", in fact, does not appear in Dr. Alexander's deposition testimony.

There is no proof in the record to indicate that Dr. Alexander has suffered any injury or damage resulting from an alleged conspiracy to intimidate him as a witness. He continues to testify. There is, furthermore, no proof in the record that because of Respondents' alleged acts, Dr. Alexander has failed to review a case, or to

testify either by deposition or in court. There is absolutely no proof whatever that Dr. Patterson or SVMIC has prevented or attempted to prevent Dr. Alexander from accepting any expert witness arrangement by the means required for a Section 1985(2) violation.

3. The record clearly supports the basis upon which the Court of Appeals affirmed the district court's decision.

Although the Court of Appeals for the Sixth Circuit did not question the determination of the district court, it decided the case on grounds other than those relied upon by the district court. *See Anderson v. Patterson*, No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Pet'r App. at 18.) After reviewing the record and briefs of the parties, the court of appeals held that the mere fact that:

> Patterson served on SVMIC's claims review committee and requested information from SVMIC, without more, does not raise a genuine issue as to whether Patterson and SVMIC conspired against him.

Anderson v. Patterson, No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Pet'r App. at 16.)

Courts of appeals may affirm the decisions of lower courts on other grounds provided the ground appears clearly in the record. *See Brown v. Saint Louis Fire Dep't*, 691 F.2d 393 (8th Cir.), *cert. denied*, 461 U.S. 908, 103 S. Ct. 1882, 76 L. Ed.2d 812 (1983); *Mason v. Clark*, 920 F.2d 493, 495 (8th Cir. 1990).

The record in these proceedings clearly indicates that Respondents are entitled to a summary judgment on the

basis of Petitioner's failure to establish the facts necessary to show a conspiracy between Dr. Patterson and SVMIC, *see supra,* and for the failure of Petitioner to allege that he has been injured as a direct result of the alleged actions of either. *See supra.* Courts of appeals are not limited to review of determinations that are raised. When as here the whole record supports the ground of the court's decision, that decision is not to be set aside for technical formalities of pleading.

Because the Court of Appeals for the Sixth Circuit properly held that Petitioner failed to establish sufficient facts raising a material fact as to whether there was a conspiracy, and the record wholly supports that determination, it was not error for the court of appeals to affirm the decision of the trial court on grounds other than those that it relied upon.

IV. CONCLUSION

It was not error for the Court of Appeals for the Sixth Circuit to affirm the decision of the district court on the ground that Petitioner had not met his burden of establishing a conspiracy. Petitioner has not, furthermore, established that any of the proceedings below are a departure from the accepted and usual course of judicial proceedings as to warrant an exercise of this Court's supervision.

Petitioner has in fact presented inaccuracies and misstatements in his Petition in an effort to invoke this Honorable Court's power to review the case.

In light of this, Respondent, Dr. Patterson, respectfully requests that this Honorable Court deny Petitioner's Petition for the Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

DATED this 6 day of December, 1994

Respectfully Submitted,

THOMASON, HENDRIX, HARVEY
JOHNSON & MITCHELL

JOHN J. THOMASON
Attorney of Record for
Respondent Sam Patterson, M.D.
One Commerce Square
29th Floor
Memphis, Tennessee 38103
(901) 525-8721

Supreme Court, U.S.
FILED
DEC 5 1994
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No. 94-836

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

ALBERT ALEXANDER, M.D.,
Petitioner,

v.

SAM PATTERSON, M.D., and STATE VOLUNTEER MUTUAL INSURANCE COMPANY,
Respondents.

On Petition For a Writ of Certiorari
to The United States Court of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT STATE VOLUNTEER MUTUAL INSURANCE COMPANY

LEO M. BEARMAN
Attorney of Record for
Respondent State Volunteer
Mutual Insurance Company

BAKER, DONELSON, BEARMAN
& CALDWELL
2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000

QUESTION PRESENTED FOR REVIEW

Whether a motion for summary judgment was properly granted when the non-moving party with the burden of persuasion offered no proof of conspiracy or damages or of a violation by either of the two alleged conspirators of a federally secured right?

PARTIES TO THE PROCEEDING

Albert Alexander, M.D., Petitioner

Attorney of Record:
Timothy R. Holton
Chambers, Crow, Durham & Holton
200 Jefferson Avenue Suite 750
Memphis, Tennessee 38103
(901) 525-4297

Sam Patterson, M.D., Respondent

Attorney of Record:
John J. Thomason
Thomason, Hendrix, Harvey, Johnson & Mitchell
2900 One Commerce Square
Memphis, Tennessee 38103
(901) 525-8721

State Volunteer Mutual Insurance Company, Respondent

Attorney of Record:
Leo M. Bearman
Baker, Donelson, Bearman & Caldwell
First Tennessee Building
165 Madison Avenue
Memphis, Tennessee 38103
(901) 526-2000

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No. 94-836

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

ALBERT ALEXANDER, M.D.,
Petitioner,

v.

SAM PATTERSON, M.D., and STATE VOLUNTEER MUTUAL INSURANCE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT STATE VOLUNTEER MUTUAL INSURANCE CORPORATION IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

State Volunteer Mutual Insurance Corporation ("SVMIC") prays that this Court deny the Petition for Writ of

Certiorari and decline to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

Pursuant to Supreme Court Rules 15.2 and 24.2, SVMIC adopts Petitioner's citation to the opinions of the courts below.

JURISDICTION

Pursuant to Supreme Court Rules 15.2 and 24.2, SVMIC adopts Petitioner's statement as to this Court's jurisdiction.

STATEMENT OF THE CASE

Pursuant to this Honorable Court's Rules, *see* Sup. Ct. R. 15.1 ("Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later"), 24.2 ("no statement of the case need be made beyond what may be deemed necessary to correct any inaccuracy or omission in the statement by the other side"), and in light of the nature of Petitioner's Statement of the Case, Respondent State Volunteer Mutual Insurance Company is compelled to restate the facts of this case including the decisions below. As Petitioner has abandoned all but his claim under Section 1985(2), this brief will address that claim only.

Petitioner, Dr. Albert Alexander, is a physician specializing in obstetrics and gynecology (hereafter "OB-GYN") who has testified and continues to testify as a paid expert witness in medical malpractice cases.

Respondent, Dr. Sam Patterson, is a physician specializing in OB-GYN. Dr. Patterson also serves as a member of a claims review committee of Respondent, State Volunteer Mutual Insurance Company. Dr. Patterson and Dr. Alexander attended medical school together and remained close friends for many years thereafter.

Respondent, SVMIC is an insurer that provides professional liability coverage for physicians practicing in Tennessee, including Petitioner, Dr. Alexander, and Respondent, Dr. Patterson.

Petitioner, Dr. Alexander, originally brought this lawsuit against five fellow physicians, the medical college from which he graduated (and on whose faculty he serves), the hospital where he practices, and his medical malpractice insurance carrier alleging a conspiracy to prevent him from testifying as an expert in medical malpractice actions or to punish him therefor. He also made claims for violations of anti-trust laws, slander, intentional infliction of emotional distress, unfair competition, and tortious interference with business relations. As the litigation progressed, many of the named parties were dismissed, and the action was limited by the district court to civil rights claims and supplemental state tort claims. After pleading and discovery, all defendants were dismissed except Respondents SVMIC and Dr. Sam

Patterson. Petitioner has now abandoned all claims except Section 1985(2).

The basis of Petitioner's claim under Section 1985(2) assertedly arises from the independent actions of Dr. Patterson as a physician and a member of the SVMIC claims review committee.

When Dr. Patterson heard rumors that Dr. Alexander had offered questionable testimony as a plaintiff's expert, Dr. Patterson, acting on his own, sought information about cases in which Dr. Alexander had testified. Acting out of concern for Dr. Alexander who was his colleague and friend, Dr. Patterson confirmed the rumors that Dr. Alexander had testified as to medical procedures about which he had no experience. Dr. Patterson wrote to Dr. Alexander imploring him to reconsider what he was doing and "testify about things truthfully and in the areas of his experience." (Docket Entry No. 63D; Deposition of Dr. Patterson at 279.) Subsequently, at Dr. Alexander's request, Dr. Patterson and two other physician friends met with Dr. Alexander to review his expert witness files and afterwards to dissuade him from testifying as an expert in areas where he had no expertise and from offering untrue testimony in areas where he was qualified. This effort bore no fruit, and the relationship between Drs. Alexander and Patterson and the other physicians began to deteriorate. Dr. Alexander continued to testify as to matters outside his expertise.

Sometime later, after he became Director of University of Tennessee Residents at Baptist Hospital East, Dr. Patterson was approached by Dr. George Ryan

concerning Alexander's performance as a member of the University faculty. Dr. Ryan had received several complaints from the residents who had objected to working with Dr. Alexander for reasons ranging from unprofessional behavior to the use of profanity. (Docket Entry No. 73B; Deposition of Dr. Ryan at 64-71.) Dr. Ryan was considering removing Dr. Alexander from the faculty but was persuaded not to do so by Dr. Patterson who vouched for Dr. Alexander's competence. In fact, Dr. Alexander remains on the faculty today. The relationship between Drs. Alexander and Patterson continued to sour, until ultimately this lawsuit ensued.

After substantial discovery, the district court granted Respondent's motion for summary judgment and determined that Petitioner's civil rights claims failed to meet the standard under Fed. R. Civ. P. 56, as construed by this Court. The district court found that Dr. Alexander failed to establish any proof in support of his allegations that Dr. Patterson and SVMIC had taken action to deter him from testifying as an expert in medical malpractice proceedings. In fact, there is no evidence in the record that SVMIC encouraged or even knew about any of Dr. Patterson's inquiries into Dr. Alexander's activities or participated in those inquiries. (Docket Entry No. 84; Deposition of Dr. Sam Patterson at 230-31.) The state claims were dismissed under the *Gibbs* Doctrine. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Petitioner's Statement of the Case contains misstatements of fact and misleading assertions as to the decisions of the courts below.

1.

Contrary to Petitioner's assertion, the district court did not "rule[] that Plaintiff had made out the necessary showing of a conspiracy," (Petition for Writ of Certiorari at 4), in its order granting summary judgment. Rather, the district court stated that Petitioner "had sufficiently *alleged* a conspiracy between the defendants," such that the claim under Section 1985(2) could survive a motion to dismiss for failure to state a claim upon which relief may be granted. *Alexander v. Patterson*, No. 90-2474-G, slip op. at 7 (W.D. Tenn. Oct. 16, 1992) (emphasis added) (Petition for Writ of Certiorari at 23.) On the motion for summary judgment, the district court, assuming a conspiracy *arguendo*, found Petitioner had not alleged "a sufficient nexus between the *alleged* conspiracy and an on-going federal proceeding, or that he has actually been deterred from testifying in federal court." *Alexander v. Patterson*, No. 90-2474-G, slip op. at 10 (W.D. Tenn. Oct. 16, 1992) (emphasis added) (Petition for Writ of Certiorari at 25.) Contrary to Petitioner's assertion, a reading of the district court's opinion makes clear that the district court never determined as a factual matter that there was a conspiracy.

2.

In his petition Dr. Alexander refers to the term "hired gun" as used by Dr. Patterson, but never gives Dr. Patterson's definition of the term. Petitioner defines the term as "his [Dr. Patterson's] pejorative for plaintiffs' experts in medical malpractice cases." (Petition for Writ of Certiorari at 7.) The record of this cause reveals that Dr.

Patterson has explained the precise meaning of the term on several occasions as being an expert who will testify concerning subjects outside his expertise, (Docket Entry No. 63D; Deposition of Dr. Patterson at 248), or as an expert "who will testify that something's true that's not true, for money." (Docket Entry No. 63D; Deposition of Dr. Patterson at 68.)

3.

Petitioner asserts that because of Dr. Patterson's efforts to dissuade him from giving untrue testimony, the court of appeals "concludes that such actions cause Plaintiff [Dr. Alexander] to be damaged." (Petition for Writ of Certiorari at 6.) There is, in fact, no such conclusion by the court of appeals. Throughout the discovery and in all of the proceedings in this cause to date, Dr. Alexander has not identified any case in which he has not testified, or expert fee he has declined or lost because of the actions of Respondents. In his deposition, Dr. Alexander was repeatedly asked to identify any *fact* that supports his allegations that Respondents did anything to ostracize him or to bring economic or professional pressure to bear upon him for testifying as an expert in medical malpractice cases or to interfere wrongfully with his business. He was unable to point to one single fact in support of those allegations. Dr. Alexander, on the other hand, would not disclose his income from litigation activities so as to give the courts below a means by which to gauge whether he has or has not been adversely affected. (Docket Entry No. 63A, 63C, Deposition of Dr. Alexander at 91, 449.)

In his deposition, Dr. Alexander was repeatedly asked to identify any *fact* that supports his allegations that SVMIC did anything to ostracize him or to bring economic or professional pressure to bear upon him for testifying as an expert in medical malpractice cases or to interfere wrongfully with his business. He was unable to point to one single fact in support of those allegations against SVMIC. (Docket Entry No. 75; Deposition of Dr. Albert Alexander at 244-61.) A typical example of the dialogue is the following:

> Q: So your response then in your interrogatories that SVMIC approved that first interview is an assumption on your part based on the fact that Dr. Patterson was on the Claims Commission of SVMIC?
>
> A: Yes. He had been since 1983.
>
> Q: You are also saying in that interrogatory response that SVMIC approved Dr. Patterson's action to include Walter Ruch and then Louie Henry to review you [sic] records and testimony in April of 1986.
>
> What information do you have or what facts are you aware of that SVMIC approved the actions to which you refer?

A: Still an assumption that he is an agent of SVMIC and they would approve of all his actions.

Q: But nobody told you specifically that SVMIC asked Dr. Patterson, Dr. Henry, or Dr. Ruch to review your records, is that correct?

A: No, I mean that's correct.

Q: Now, you say that Dr. Patterson met with George Ryan, the same interrogatory response here, for the purpose of removing you from the teaching staff of the UT medical units, which would cause you to lose credibility as a witness, and you say that Dr. Patterson was SVMIC's agent when he met with Dr. George Ryan, was acting as SVMIC's agent. Do you have any *facts* to support that?

A: None other that he is on the Claims Adjustment Board.

Q: No one has told you Dr. Patterson was acting as a SVMIC agent in that regard, is that correct?

A: No, there doesn't seem to be any controversy that Dr. Patterson is on the Claims Adjustment Board.

Q: I understand that, but no one has told you that he was acting as SVMIC's agent when he met with Dr. Ryan, did they?

A: No.

Q: Has anyone ever told you that SVMIC has ever talked to anyone about limiting referrals from other physicians to you?

A: I don't recall.

Q: Are you aware of any *facts* that would support the allegation of this lawsuit that SVMIC in any way interfered or anyone acting on their behalf in any way interfered with referrals of patients by other physicians to you?

A: *I don't recall any facts.*

Q: Are you aware of any *facts* that would support your claim that SVMIC has ever interfered with existing business relationships you

have had in the practice of medicine?

A: *I don't have any facts.*

Q: Are you aware of any *facts* which would support your allegation that SVMIC has engaged in what might be considered false or misleading representations relative to your medical practice and your medical expert testimony?

A: *I don't have any facts* other than I consider Dr. Patterson is their agent and all of the facts that apply to him apply to them.

(Docket Entry No.75; Deposition of Dr. Albert Alexander at 409-15) (emphasis added).

On appeal, a panel of the United States Court of Appeals for the Sixth Circuit held that, "Alexander's proof, that Patterson served on SVMIC's claims review committee and requested information from SVMIC, without more, does not raise a genuine issue as to whether Patterson and SVMIC conspired against him." *Alexander v. Patterson*, No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Petition for Writ of Certiorari at 16.) But, in his Petition, Dr. Alexander also states that "the Sixth Circuit held that Plaintiff had shown that he was damaged." (Petition for Writ of Certiorari at 5.) In fact, the Sixth Circuit did not so hold. In his Petition, Dr. Alexander

states that "the Sixth Circuit *found* that Defendant and, 'others,' took actions which harmed the Plaintiff." (Petition for Writ of Certiorari at 6.) (emphasis added) (prior emphasis deleted). There is no such finding in the Sixth Circuit's opinion. The only possible excerpt upon which Petitioner may base such a conclusion is the following quotation from the "Background" section of the court's opinion:

> Alexander *claims* that this conduct has made him fearful when he testifies, prevented him from gaining membership in a health provider organization, caused him to lose physician referrals, and prompted his colleagues to shun him.

Alexander v. Patterson, 92-6424, slip op. at 2 (6th Cir. Aug. 10, 1994) (emphasis added) (Petition for Writ of Certiorari at 15.) A court's "finding" is distinct from a recitation of an allegation.

4.

In addition to the above, there is no evidence in this record that SVMIC encouraged or even knew about any of Dr. Patterson's inquiries into Dr. Alexander's activities or that SVMIC participated in those inquiries. (Docket Entry No. 84; Deposition of Patterson at 230-231). There is no evidence in the record that Dr. Patterson was asked to be a member of the Claims Review Committee because of Patterson's stand regarding the testimony by "hired guns" in medical malpractice cases.

Dr. Patterson admits that all his actions in this case relative to Dr. Alexander were his own and that SVMIC was completely unaware of those activities. (Docket Entry No. 84; Deposition of Patterson at 230-231, 248). The records of SVMIC support this lack of awareness or support for Patterson's activities. (Docket Entry No. 81; Deposition of Harold Burch at 51-53.)

Respondent respectfully submits that the foregoing discussion and clarification of the misstatements in the Petition demonstrate inaccuracies in the Petition sufficient to constitute ground for a Rule 14.5 denial of the Petition.

SUMMARY OF ARGUMENT

1. The Court of Appeals for the Sixth Circuit did not depart from the accepted and usual course of judicial proceedings so as to require this Honorable Court to exercise its power of supervision by holding that Petitioner's bare allegations did not establish the conspiracy necessary to state a claim under Section 1985(2). Petitioner failed to set forth facts to support the allegations in the pleadings that Respondents conspired to deprive Petitioner of his rights. To withstand a motion for summary judgment, the non-movant cannot rest on his pleadings.

2. The district court properly construed Section 1985(2) to require that Petitioner must show a nexus between the alleged conspiracy and the right sought

to be vindicated under the statute. The remedy provided under Section 1985(2) requires that Petitioner be denied or deterred from testifying either presently or in future cases, and he has failed to make that showing. In fact, Petitioner states that he continues to testify and intends to do so in the future.

3. The record clearly supports the basis upon which the Court of Appeals affirmed the district court's decision.

REASONS FOR DENYING THE PETITION

1. The unsupported allegations of Petitioner do not establish a genuine issue of material fact as to whether the Respondents conspired to deprive Petitioner of his rights under Section 1985(2) sufficient to withstand a motion for summary judgment; summary judgment was therefore properly granted and affirmed.

To withstand a motion for summary judgment, the non-movant (Alexander) who bears the burden of persuasion at trial cannot rest on the pleadings, but must go beyond the pleadings and "designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (*quoting* Fed. R. Civ. P. 56). Although reasonable inferences are given to the

non-movant, *see Celotex*, 477 U.S. at 317, the party moving for summary judgment can prevail by pointing out to the court that "there is an absence of evidence to the support the non-moving party's case." *Celotex*, 477 U.S. at 324.

In the courts below, Dr. Alexander could not show the conspiracy necessary to support a Section 1985(2) claim, *Alexander v. Patterson,* No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Petition for Writ of Certiorari at 16); nor was there evidence of any intimidation, threat or force used against him by Dr. Patterson or SVMIC. *Alexander v. Patterson,* No. 90-2474-G, slip op. at 10 (W.D. Tenn. Oct. 16, 1992) (Petition for Writ of Certiorari at 24-25.)

Conceptually, a civil conspiracy is illusive to define. The decisions agree, however, that to establish the claim, there must be some form of agreement between the actors. *Sampson v. Village Discount Outlet, Inc.,* 832 F. Supp. 1163, 1168 (N.D. Ill. 1993) ("An additional basis for denying [a plaintiff's] claim under § 1985(2) is his failure to demonstrate the existence of a conspiratorial agreement between the defendants."); *see also Bank v. DiMarco,* 836 F. Supp. 304 (E.D. Pa.), *aff'd,* 27 F.3d 556 (1993); *Myatt v. City of Chicago,* 816 F. Supp. 1259 (N.D. Ill. 1992); *McKenzie v. Doctor's Hospital of Hollywood, Inc.,* 765 F. Supp. 1504 (S.D. Fla. 1991); *Petroleum Energy, Inc. v. Mid-America Petroleum, Inc.,* 775 F. Supp. 1420 (D. Kan. 1991). Because a conspiracy is an essential element of a claim under Section 1985(2), Petitioner bears the burden of persuasion at trial of establishing a conspiracy. Petitioner, however, failed to produce more than his bare allegations. As the court of appeals succinctly stated:

> The district court did not err in granting summary judgment against Alexander because Alexander's proof, that Patterson served on SVMIC's claims review committee and requested information from SVMIC, without more, does not raise a genuine issue as to whether Patterson and SVMIC conspired against him.

Alexander v. Patterson, No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Petition for Writ of Certiorari at 16.) After months of discovery and countless depositions of various doctors allegedly involved in the conspiracy, Petitioner could muster nothing more to substantiate his claims than he could at the time of filing his original complaint. The record buttresses this. There is no evidence in the record that Dr. Patterson was asked to be a member of the claims review committee of SVMIC because of his concern about Dr. Alexander's questionable expert testimony. Furthermore, Dr. Patterson states that all of his actions in this case relative to Dr. Alexander were his own and motivated by feelings of personal concern and friendship toward Dr. Alexander and that SVMIC was completely unaware of those activities. (Docket Entry No. 84; Deposition of Dr. Sam Patterson at 230-31, 248.) Dr. Patterson was not acting on behalf of SVMIC during any of his conversations with Alexander or with others about Alexander, nor was SVMIC aware that the conversations took place.

Furthermore, Petitioner's own statements reveal the absence of any conspiracy including Dr. Patterson. When asked specifically on what facts he based the

allegation that Dr. Patterson devised a plan, Alexander responded as follows:

> He announced that - he stated that Dr. Ryan had called him in and asked him to remove me from the clinical faculty and that he said he didn't want to do that,...

(Docket Entry No. 75, Depo. of Albert Alexander at 114.)

With regard to Respondent, SVMIC, there has been no hint that anyone connected with SVMIC knew that Dr. Patterson planned to meet with Dr. Alexander for the purpose of dissuading him from giving untrue testimony. Throughout the depositions and discovery process, Petitioner has sought to link knowledge of the meeting with someone, anyone connected with SVMIC. This effort, however, has been to no avail, because no one at SVMIC knew of the meeting until the institution of this suit. Furthermore, with regard to the meeting of various doctors, nowhere in the transcript of that meeting does Dr. Patterson threaten Dr. Alexander or request that he cease testifying as an expert witness. Nor could Dr. Alexander show the conspiracy necessary to support the Section 1985(2) claim. Without a showing that the only other alleged conspirator had knowledge of the alieged overt act, there can be no conspiracy. To bridge this gap, Petitioner asserts that because Dr. Patterson was on the claims review committee, and that because SVMIC has a financial stake in the outcome of malpractice cases, ipso facto there is an agreement between the two parties to prevent Dr. Alexander from testifying as an expert.

Dealing specifically with civil conspiracy, the Tennessee Court of Appeals found in *Pusser v. Gordon,* 624 S.W.2d 639, 642 (Tenn. App. 1984), that competent proof cannot be drawn from an inference on an inference. *Id.* (citing *Umstattd v. Metropolitan Life Insurance Co.,* 21 Tenn. App. 312, 110 S.W.2d 243 (Tenn. App. 1937)); *see also Bowers v. Potts,* 617 S.W.2d 149 (Tenn. App. 1981).

A case should not be sent to a jury when there is only a mere scintilla of evidence to support a plaintiff's theory. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *see also Sadek v. Nashville Recycling Co.,* 751 S.W.2d 428 (Tenn. App. 1988). A plaintiff's verdict in a conspiracy case, furthermore, must not be based on inference, conjecture, or speculation, but must be based on substantial and material evidence. *Sampson v. Village Discount Outlet, Inc.,* 832 F. Supp. 1163, 1168 (N.D. Ill. 1993) ("Unsupported inferences and conclusions are insufficient to support a claim of conspiracy."); *see also Sadek,* 751 S.W.2d at 428; *Bowers v. Potts,* 617 S.W.2d 149 (Tenn. App. 1981).

The allegations of Petitioner, unsupported by facts, do not establish that there is a genuine issue as to whether Respondents, Dr. Patterson and SVMIC, conspired to deprive Petitioner of his rights under Section 1985(2). The record reflects in fact, precisely to the contrary, as the statement of the case above, points out.

2. The district court properly determined that Section 1985(2) requires a nexus between an alleged conspiracy and the right sought to be vindicated under the statute.

The Section 1985(2) claim for a deprivation of federally protected rights includes an action based on a conspiracy to deter the claimant from testifying freely, fully, and truthfully in an on-going federal proceeding. *See Kush v. Rutledge,* 460 U.S. 719 (1983). The other action available to Petitioner provides a remedy for a witness who is injured "in his person or property on account of his having so attended or testified." 42 U.S.C. § 1985(2) (1988).

These so-called "witness intimidation" provisions protect against purely private conspiracies aimed at impeding the administration of justice in the federal courts. *See Kush v. Rutledge,* 460 U.S. at 424-26. The district court addressed the issue of whether Petitioner had established that he had suffered any harm "at any time since the *alleged* conspiracy began." *Alexander v. Patterson*, No. 90-2474-G, slip op. at 7 (W.D. Tenn. Oct. 16, 1992) (emphasis added) (Petition for Writ of Certiorari at 25). Without addressing whether Petitioner had met his burden under rule Fed. R. Civ. P. 56 for establishing a conspiracy, the district court reasoned as follows:

> Although Alexander alleges that Patterson and SVMIC conspired to prevent him from testifying for the plaintiff in

medical malpractice actions, in both federal and state court, plaintiff has not alleged that he has been in any way injured or deterred from testifying in any particular proceeding in federal court. In particular, plaintiff has not established or even alleged that he was actually hindered from testifying 'freely, fully and truthfully' at any time since the alleged conspiracy began, or that the alleged conspiracy has involved any federal proceeding.

Nor has plaintiff sufficiently alleged that defendants' conspiracy has resulted in any injury to him on account of his having 'attended or testified' in past cases in federal court. At his deposition, Alexander could not state the number of times he has testified in court or been deposed in medical malpractice cases and could not remember the specific number of times he has testified for or consulted with plaintiffs in such cases during the last year. He has not provided any evidence or support beyond his allegations that the has been hampered or deterred from testifying in malpractice cases in federal court, or that he has been retaliated against because of his testimony. Where the witness or party is not hampered or deterred from testifying in a federal proceeding, there is no deprivation of rights or injury as required by § 1985(2).

Alexander v. Patterson, No. 90-2474-G, slip op. at 7 (W.D. Tenn. Oct. 16, 1992) (Petition for Writ of Certiorari at 25); *see also, e.g., Bretz v. Kelman,* 773 F.2d 1026 (9th Cir. 1985); *Brawer v. Horowitz,* 535 F.2d 830 (3d Cir. 1976). When the party alleges a deprivation under Section 1985, he must show an injury resulting therefrom. *See Rylewicz v. Beacon Services, Ltd.,* 888 F.2d 1175 (7th Cir. 1989). A direct injury from the alleged conspiracy is an essential element of proof for a Section 1985(2) violation. *See Koehler v. Cummings,* 380 F. Supp. 1294 (W.D. Tenn. 1971). And without an injury resulting in damage, an action for civil conspiracy cannot be established. *See id.*

Despite the findings of the district court and the proof in the record, including Petitioner's own admissions, he insists that this Court should review his claim because, as Petitioner states:

> The Opinion recites that:
>
> > "...[H]e,{Defendant Patterson}[sic] and others, confronted Alexander and tried to dissuade him from testifying in future cases[.]" and [sic] concludes that such actions caused Plaintiff to be damaged.

(Petition for Writ of Certiorari at 6.) Despite the thinly veiled attempt to attribute a conclusion to the court of appeals which it clearly did not reach, Petitioner misses the point. The district court determined that there was no nexus between the alleged conspiracy and either present or future testimony in federal trials. Petitioner's blanket allegation of "damage" sounds in tort which is where this

claim would be heard, if at all. *See Griffin v. Breckenridge,* 403 U.S. 88 (1971) ("That the statute [§ 1985(3)] was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others."); *see also Kimble v. D.J. McDuffy, Inc.,* 648 F.2d 340, 348 (5th Cir. 1981). The district court stated that:

> To establish a claim under the first part of § 1985(2), the plaintiff must show (1) a conspiracy between two or more persons, (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiff. The intent of §1985(2) is to prevent conspiracies "the object of which is intimidation of or retaliation against parties or witnesses, or grand or petit jurors, in any court of the United States." The statute is concerned with conspiracies involving perjury, subornation of perjury, or criminal obstruction of justice. An action under §1985(2) must therefore involve the intimidation of witnesses, parties or court officers in an ongoing federal proceeding, and there must be a connection between the conspiracy and the witness, party, or juror. There can be no violation of §1985(2) unless the plaintiff establishes a nexus between an alleged conspiracy and a federal court proceeding.

Alexander v. Patterson, No. 90-2474-G, slip op. at 7 (W.D. Tenn. Oct. 16, 1992)(citations omitted)(footnote omitted)(Petition for Writ of Certiorari at 25); *see also David v. United States*, 820 F.2d 1038 (9th Cir. 1987); *Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496, 498 (9th Cir. 1985); *Chahal v. Paine Webber, Inc.*, 725 F.2d 20, 23 (2d Cir. 1984). Although the district court did not reach the question of whether Petitioner had established a conspiracy, the court was justified in dismissing Petitioner's claim on the ground that he had not alleged a nexus between the alleged conspiracy and the harm sought to be remedied under Section 1985(2).

The district court correctly found that Petitioner had failed to establish any genuine issue of material fact sufficient to overcome the pending motions for summary judgment. Because Petitioner failed to identify a genuine issue of material fact upon which liability could be found on the part of Dr. Sam Patterson and SVMIC, the district court properly granted the motion for summary judgment. The district court was presented with substantial testimony which undermined Dr. Alexander's conclusions and allegations. In viewing the proof presented by Dr. Alexander, the district court found a string of vague conclusions and unrelated events which, Dr. Alexander claims, formed some elaborate "plan" to discredit him, spear-headed by Dr. Patterson. *See Sampson*, 832 F. Supp. at 1168 ("[A plaintiff] is required to show that there was 'a single plan, the essential nature and general scope of which was known to each person who is to be held responsible for its consequences.'") (*quoting Lenard v. Argento*, 699 F.2d 874, 883 (7th Cir. 1983)). Petitioner's proof, however, consists of conjecture, speculation and

inference. The facts presented to the trial court by deposition testimony do not support the inferences drawn by Dr. Alexander. As Dr. Patterson stated:

> Well, I wasn't doing it [investigating] representing the insurance company. Albert was just my good friend about whom there was bad gossip going on and I didn't believe it was really true and I wanted to find out if that's what really what was going on.

(Docket Entry No. 63D; Deposition of Dr. Patterson at 231.) When asked if he was keeping anyone appraised of his progress in trying to dissuade Dr. Alexander from giving untrue testimony, Dr. Patterson stated:

> Well, there wasn't any progress. I just made these three or four phone calls one morning. That was it. There wasn't anybody to appraise of the progress.

(Docket Entry No. 63D; Deposition of Dr. Patterson at 234.) There was no proof available to the district court that anyone acted with Dr. Patterson to deter Dr. Alexander by force, threats, or intimidation. The word "force", in fact, does not appear in Dr. Alexander's deposition testimony.

There is no proof in the record to indicate that Dr. Alexander has suffered any injury or damage resulting from an alleged conspiracy to intimidate him as a witness. He continued and continues to testify. There is, furthermore, no proof in the record that because of

Respondents' alleged acts, Dr. Alexander has failed to review a case, or to testify either by deposition or in court. There is absolutely no proof whatever that Dr. Patterson or SVMIC has prevented or attempted to prevent Dr. Alexander from accepting any expert witness arrangement by the means required for a Section 1985(2) violation.

3. The record clearly supports the basis upon which the Court of Appeals affirmed the district court's decision.

Although the Court of Appeals for the Sixth Circuit did not question the determination of the district court, it decided the case on grounds other than those relied upon by the district court. *See Anderson v. Patterson,* No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Petition for Writ of Certiorari at 14). After reviewing the record and briefs of the parties, the court of appeals held that the mere fact that:

> Patterson served on SVMIC's claims review committee and requested information from SVMIC, without more, does not raise a genuine issue as to whether Patterson and SVMIC conspired against him.

Anderson v. Patterson, No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Petition for Writ of Certiorari at 16).

Courts of appeal may affirm the decisions of lower courts on other grounds provided the ground appears

clearly in the record. *See Brown v. Saint Louis Fire Dep't,* 691 F.2d 393 (8th Cir.), *cert. denied,* 461 U.S. 908 (1983); *Mason v. Clark,* 920 F.2d 493, 495 (8th Cir. 1990).

The record in these proceedings clearly indicates that Respondents are entitled to a summary judgment on the basis of Petitioner's failure to establish the facts necessary to show a conspiracy between Dr. Patterson and SVMIC, and for the failure of Petitioner to allege that he has been injured as a direct result of the alleged conspiracy. The Court of Appeals for the Sixth Circuit held that Petitioner failed to establish sufficient facts raising a material fact as to whether there was a conspiracy, and the record wholly supports that determination. Courts of appeal are not limited to review of determinations that are raised. In light of this, it was not error for the court of appeals to affirm the decision of the trial court on grounds other than those that it relied upon.

CONCLUSION

It was not error for the Court of Appeals for the Sixth Circuit to affirm the decision of the district court on the ground that Petitioner had not met his burden of establishing a conspiracy. Petitioner has not, furthermore, established that any of the proceedings below are a departure from the accepted and usual course of judicial proceedings as to warrant an exercise of this Court's supervision.

Petitioner has in fact presented inaccuracies and misstatements in his Petition in an effort to invoke this Honorable Court's power to review the case.

In light of this, Respondent SVMIC respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

Leo M. Bearman
Attorney of Record for
Respondent State Volunteer
Mutual Insurance Company

BAKER, DONELSON,
BEARMAN & CALDWELL
2000 First Tennessee Bldg.
Memphis, TN 38103
(901) 526-2000